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**BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA**

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IN THE MATTER OF APPLICATIONS NO.)
41H-30013196 AND NO. 41H-30013197)
TO CHANGE WATER RIGHT NOS. 41H-)
W008336 AND 41H-W008335 BY)
DENNIS D SIMPSON)

PROPOSAL FOR DECISION

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* * * * *

6 Pursuant to the Montana Water Use Act (Mont. Code Ann. § 85-2-101et.seq.) and to the
7 contested case provisions of the Montana Administrative Procedures Act (Mont. Code Ann. § 2-
8 4-101 et. seq.), and after notice required by Mont. Code Ann. § 85-2-307, a hearing in the above
9 titled matter was held in Bozeman, Montana, on March 21, 2007. The purpose of this hearing
10 was to determine whether Application to Change Water Right Nos. 41H-30013196 and 41H-
11 30013197 should be approved for Applicant Dennis D. Simpson, in accordance with the
12 requirements and criteria set forth in M.C.A. § 85-2-402. For purposes of these applications,
13 the Department shall approve a change in appropriation if the applicant proves by a
14 preponderance of the evidence that (1) the proposed change in appropriation right will not
15 adversely affect the use of the existing water rights of other persons or other perfected or
16 planned uses or developments for which a permit or certificate has been issued, (2) the
17 proposed means of diversion, construction, and operation of the appropriation works are
18 adequate, (3) the proposed use is a beneficial use, (4) the applicant has a possessory interest
19 in the property where the water is to be put to beneficial use, and (5) the water quality of a prior
20 appropriator will not be adversely affected.

21

Preliminary Matters

22 These two applications received a total of eleven separate objections. Application No.
23 41H-30013196 (3196) was objected to by Hecox Family Trust, Anthony Kolnik, Frank Silva,
24 Russell and Roselee Faust (Fausts) and David Potts. Application No. 41H-30013197 (3197)
25 was objected to by Frank and Gina Albini, Lower Middle Creek Supply Ditch Company, Middle
26 Creek Meadows Water Users Association, Debra Wahlberg, Dennis Marlow, and Montana River
27 Action Network. On September 26, 2006 I ordered that 3196 and 3197 be consolidated for a

1 single hearing. Prior to the hearing, on March 7, 2007 the Hearing Examiner received a "Motion
2 for Entry of Default or, in the Alternative, Renewed Motion to Preclude Presentation of Evidence
3 and Testimony" from counsel for Simpson. The motion was directed toward objectors
4 Wahlberg, Middle Creek Meadows, Kolnik, Hecox, Silva, and Albini (Non-Responding
5 Objectors) for failure to respond to discovery requests.

6 Immediately prior to the hearing on March 21, 2007, the parties met for settlement
7 discussions before the hearing began. As a result of these discussions, a settlement
8 agreement was reached between applicant Simpson and objector Lower Middle Creek Ditch
9 resulting in the withdrawal of that objection. The settlement agreement also resulted in the
10 withdrawal of objector Albini and confirmed a previously filed conditional withdrawal of objector
11 Wahlberg. A copy of the settlement agreement was provided for the record in this matter and
12 will be considered as discussed below.

13 Upon opening the hearing, three preliminary matters were raised by counsel for
14 Simpson. First, the issue of the March 7, 2007, "Motion for Entry of Default." As to objectors
15 Hecox and Kolnik, because they were subject of the motion and they did not appear at the
16 hearing, the Hearing Examiner ordered them in default as provided under A.R.M. 36.12.208. As
17 to objectors Middle Creek Meadows and Silva, the Hearing Examiner ordered that their
18 participation in the hearing be limited to cross examination of other parties but that they would
19 not be allowed to present evidence and testimony in this matter, in accordance with A.R.M.
20 36.12.215. Counsel for Simpson also made a request at the hearing that objector Marlow be
21 included as a Non-Responding Objector. After brief *voir dire*, the Hearing Examiner ordered
22 that objector Marlow, who responded to a first round of discovery but did not respond to a
23 second round of discovery, be limited to presenting evidence and testimony related only to
24 issues raised in the first round of discovery. The Hearing Examiner made no order regarding
25 objectors Wahlberg and Albini, as they had previously entered their withdrawals.

26 Second, counsel for Simpson raised the issue that both Middle Creek Meadows and
27 Montana River Action Network are both corporations formed under Montana Law and that as
28 corporations those entities must be represented by counsel in this proceeding to avoid the
29 unauthorized practice of law in this State. Middle Creek Meadows was represented at the
30 hearing by Bruce Wilson, president of the corporation and Montana River Action Network was
31 represented at the hearing by Joe Gutkowski, president of that corporation. Neither of these

1 individuals is licensed to practice law in the State of Montana. As such, the Hearing Examiner
2 precluded those individuals from participating in the hearing, either in the form of presenting
3 testimony and evidence on behalf of their corporations or in the cross examination of other
4 witnesses. The Hearing Examiner did allow both of those individuals to make personal
5 statements regarding the matters at issue.

6 The status of the original objectors at the beginning of the substantive portion of the
7 hearing then was as follows:

8	Lower Middle Creek Supply Ditch Company	- withdrawn
9	Frank and Gina Albini	- withdrawn
10	Debra Wahlberg	- withdrawn
11	Hecox Trust	- defaulted
12	Anthony Kolnik	- defaulted
13	Middle Creek Meadows Water Users	- no direct or cross, personal statement
14	Montana River Action Network	- no direct or cross, personal statement
15	Frank Silva	- limited to cross only
16	Dennis Marlow	- limited to first discovery issues and cross
17	David Potts	- full participation
18	Fausts	- full participation

19
20 Third, and finally, counsel for Simpson requested that the Hearing Examiner detail the
21 precise criteria which must be addressed at the hearing. Upon review of the issues raised
22 through objections and through the Hearing Examiner's review of the application files, the
23 Hearing Examiner determined that the issues for the hearing would be adverse affect, adequacy
24 of the means of diversion, and water quality.

25 Appearances

26 Applicant Dennis Simpson appeared at the hearing by and through counsel Harley R.
27 Harris. Testifying on behalf of the applicant were Joe Bruno, Dave Schmidt, and Dave Baldwin.
28 Objector David Potts appeared at the hearing *pro se* and presented no witnesses. Objector
29 Fausts appeared at the hearing through Roselee Faust, *pro se*, and presented no witnesses.
30 Objector David Marlow appeared at the hearing *pro se* and presented no witnesses. Objector
31 Frank Silva appeared at the hearing *pro se* and presented no witnesses. Objectors Middle
32 Creek Meadows Water Users and Montana River Action Network did not appear at the hearing
33 but Bruce Wilson and Joe Gutkowski, members of those respective entities, were afforded the
34 opportunity to make personal statements at the hearing.

35 Exhibits

36 Applicant Simpson offered and I admitted the following exhibits into evidence:

- 1 **A-1** – an affidavit of Joseph B. Bruno dated March 3, 2005
2 **A-2** – an affidavit of Joseph B. Bruno dated March 2, 2005
3 **A-3** – the resume of David M. Schmidt
4 **A-4** – an oblique aerial photograph of the Simpson ponds (undated)
5 **A-4a** – a vertical aerial photograph of the Simpson ponds and diversions (undated)
6 **A-4b** – a settlement agreement and conditional withdrawal of objection between Lower Middle
7 Creek Supply Ditch Company and Applicant Dennis D. Simpson
8 **A-5** – a letter consisting of 5 pages, dated March 23, 2005, from David Schmidt to Jan Mack,
9 DNRC Water Resources Specialist
10 **A-6** – a letter consisting of 4 pages, dated March 23, 2005, from David Schmidt to Jan Mack,
11 DNRC Water Resources Specialist
12 **A-7** – the resume of David O. Baldwin
13 **A-8** – an enlarged vertical aerial photograph of the Simpson ponds showing the locations of
14 certain wells and properties (undated)
15 **A-9** – a graph depicting water levels of the Simpson pond and adjacent wells prepared by Dave
16 Baldwin
17 **A-10** – a copy of answers to discovery by Dave Potts and a series of well logs, well test results
18 and septic system permits and analyses consisting of 14 pages.
19 Objector Potts offered and I admitted the following exhibits into evidence:
20 **OP-1** – five pages of photographs showing water levels and culverts in Elk Grove Slough and
21 the Simpson ponds (October and December 2004)
22 **OP-2** – a table consisting of two pages showing water level data for the Simpson pond and
23 adjacent wells compiled by Dave Potts.

Findings of Fact

- 25 1. Application to Change a Water Right No. 41H-30013196 in the name of Dennis D.
26 Simpson proposing to make a change to Statement of Claim No. 41H-W008336, was
27 filed with the Department on November 29, 2004. (Department file)
28 2. Application to Change a Water Right No. 41H-30013197 in the name of Dennis D.
29 Simpson proposing to make a change to Statement of Claim No. 41H-W008335, was
30 filed with the Department on November 29, 2004.

- 1 3. Notice of Application No. 41H-30013196 was properly made by actual service and
2 service by publication in the Bozeman Daily Chronicle on April 28, 2005. (Department
3 file)
- 4 4. Notice of Application No. 41H-30013197 was properly made by actual service and
5 service by publication in the Bozeman Daily Chronicle on May 24, 2005. (Department
6 file)
- 7 5. An Environmental Assessment (EA) for Application No. 41H-0013196, dated April 28,
8 2005, has been reviewed and is included in the Department's file. (Department file)
- 9 6. An Environmental Assessment (EA) for Application No. 41H-30013197, dated May 9,
10 2005, has been reviewed and is included in the Department's file. (Department file)
- 11 7. Application Nos. 41H-30013196 and 41H-30013197 were consolidated for hearing by
12 Order of the Hearing Examiner pursuant to A.R.M. 36.12.210. (Order of September 26,
13 2006)
- 14 8. The water rights being changed are Statement of Claim No. 41H-W008336 (8336) and
15 Statement of Claim No. 41H-W008335 (8335) which are supplemental to each other with
16 overlapping place of use for the irrigation of a maximum of 65 acres (16 acres in SWSW,
17 Sec. 13; 35 acres in NWNW Sec. 24; and 14 acres in SWNW Sec. 24; T2S, R4E; all in
18 Gallatin County). Claim No. 8336 is for a maximum flow rate of 1.13 cfs from the West
19 Gallatin River via the Allison Lewis Ditch with a priority of May 1, 1867 and Claim No.
20 8335 is for a maximum flow rate of 1.25 cfs from an unnamed tributary of Elk Grove
21 Slough with a priority of July 1, 1959. Neither claim specifies a maximum volume, but
22 Claim No. 8336 states that the maximum volume shall not exceed the amount put to
23 historical and beneficial use. The period of diversion for both claims is from May 15 to
24 August 19. (Department file, DNRC Water Right Records)
- 25 9. The applicant proposes to retire the historically irrigated acres and change the purpose
26 of use to two connected ponds located within the same area as the retired irrigation for
27 the purpose of recreation and fish. The ponds were developed from a gravel mining
28 operation almost entirely within the area of the retired irrigation rights. The ponds will
29 have a total capacity of 198.85 acre-feet. Of this capacity between 112.9 and 151.1
30 acre-feet will be provided by natural ground water seeping into the old gravel pit(s). The
31 amount of water provided by ground water seepage will fluctuate seasonally. This
32 seepage is not part of the permit applications, rather the permit applications are
33 supplemental to the natural ground water seepage which does not require authorization

1 from the Department. A maximum of 85.95 acre-feet will be needed to fill the ponds to
2 capacity ($198.85 - 112.9 = 85.95$). (Department file, Exhibit A-5)

3 **Adverse Effect**

- 4 10. The record shows that 45 acres of alfalfa/grass was historically irrigated until
5 approximately 1999 in the area which now contains the ponds created by the gravel
6 mining operation. The consumptive use of water from 45 acres of irrigated alfalfa/grass
7 in this area is approximately 58.73 acre-feet ($15.66 \text{ inches per acre} \times 45 \text{ acres} / 12$) for
8 an irrigation season of May 15 through August 19. At 55% delivery efficiency, 58.73
9 acre-feet of consumptive use requires the diversion and delivery of approximately 107
10 acre-feet of water. (Exhibits A-1, A-2, A-5, A-6, Testimony of Dave Schmidt, Department
11 File)
- 12 11. Evaporation from the free water surface of the ponds during the period of use proposed
13 under these two applications is approximately 22 acre-feet. (Testimony of Dave
14 Schmidt)
- 15 12. The amount of water being changed under a change application cannot exceed or
16 increase the flow rate historically diverted under the historic use, nor exceed or increase
17 the historic volume of water consumptively used. (A.R.M. 36.12.1902).
- 18 13. The Applicant has agreed, as evidenced by the settlement agreement labeled Exhibit A-
19 4B, to install measuring flumes in Elk Grove Slough immediately above the confluence of
20 Elk Grove Slough and the Allison Lewis Ditch, in Elk Grove Slough immediately below
21 the proposed point of diversion, and in the Allison Lewis Ditch immediately above the
22 confluence of Elk Grove Slough with the Allison Lewis Ditch, all measuring flumes to be
23 installed by a qualified professional engineer; to replace his existing diversion culvert
24 with an appropriate, non-leaking and lockable diversion structure no greater than ten
25 inches in diameter with a screw gate; that the period of diversion under Application No.
26 41H-30013197 be listed as May 15 through August 15; to limit the maximum rate of
27 diversion at the Applicant's diversion structure under Statement of Claim 8335 to 1.25
28 cfs, and if diversion exceeds 1.25 cfs that such excess water be available under his
29 water right evidenced in Statement of Claim 8336; and that any portion of the settlement
30 agreement not incorporated as conditions in any change authorization(s) issued by the
31 Department remain enforceable as between the parties. (Exhibit A-4B)

1 **Adequacy of Appropriation Works**

- 2 14. The majority of the works for delivering water to the previously irrigated alfalfa/grass
3 (now the location of the ponds) has been in place for many years. Water was historically
4 diverted via the Allison-Lewis Ditch out of the West Gallatin River (Statement of Claim
5 8336) and associated laterals. In addition, water was used from Elk Grove Slough
6 (Statement of Claim 8335) via gravity flow pipeline and drainage ditches. The proposed
7 diversion system is not significantly different from the historical system. (Exhibit A-1, A-
8 2, Testimony of Dave Schmidt)
- 9 15. It is apparent from the testimony given and the admitted Exhibits that there currently
10 exists some infrastructure for delivering water to the ponds. This infrastructure appears
11 to be consistent with the delivery system which was in place during the historic irrigation
12 practices. (Testimony of Dave Schmidt; Exhibit OP-1)
- 13 16. The Applicant has agreed to make improvements to the existing water delivery
14 infrastructure through the Settlement Agreement and including the appropriate portions
15 thereof as conditions for the issuance of any permit. (Exhibit A-4B)

16 **Beneficial Use**

- 17 17. The application(s) for this change list recreation and fish as the beneficial uses. In
18 addition, testimony and exhibits were introduced which list the beneficial uses as water
19 recreation and fishing and that by filling the ponds to their desired capacity an “eyesore”
20 will be alleviated and the area will benefit by improved aesthetics. (Testimony of Dave
21 Schmidt; Exhibits A-5, A-6)
- 22 18. The North Pond (which is physically connected with the South Pond) will be 25 feet deep
23 when filled to the desired surface water elevation. Exhibits A-5 and A-6 indicate that the
24 Montana Department of Fish, Wildlife and Parks state that 15% of a pond floor should be
25 at least 12 to 15 feet deep to allow for a cold water zone and fish over-wintering.
26 (Exhibits A-5, A-6)
- 27 19. No objections were received regarding the beneficial use criteria of M.C.A. § 85-2-402
28 and no evidence was received challenging the beneficial uses proposed under these
29 change applications. (Department File)

1 **Possessory Interest**

2 20. No objections were received regarding the possessory interest criteria of M.C.A. § 85-2-
3 402 and no evidence was received challenging possessory interest under these change
4 applications. (Department File)

5 21. The Applicant has a possessory interest in both the area previously irrigated and the
6 current location of the ponds. They are essentially the same area. (Department File)

7 **Water Quality**

8 22. Objections were received relating to concerns over “mounding” of the local water table
9 which could interfere with nearby septic systems and domestic wells.

10 23. Water levels found in monitoring wells and the surface water level in the ponds respond
11 to regional changes in the water table. (Testimony of Dave Baldwin, Exhibit A-9)

12 24. As fine sediments settle out in the ponds the pond bottom seals off which results in
13 minimal or no localized mounding of the water table. The extent of the amount of any
14 mounding is not known. (Testimony of Dave Baldwin, Exhibit A-9, A-10, Testimony of
15 Dave Potts)

16 25. Any mounding which does occur will be minimal and will not affect septic systems in the
17 area. (Testimony of Dave Baldwin)

18
19 **Conclusions of Law**

- 20 1. The Department has jurisdiction to approve a change in appropriation right if the
21 appropriator proves the criteria in Mont. Code Ann. § 85-2-402.
- 22 2. The Department shall approve a change in appropriation right if the appropriator proves
23 by a preponderance of evidence the proposed change in appropriation right will not
24 adversely affect the use of the existing water rights of other persons or other perfected
25 or planned uses or developments for which a permit or certificate has been issued or for
26 which a state water reservation has been issued; except for a lease authorization
27 pursuant to Mont. Code Ann. §85-2-436, a temporary change authorization for instream
28 use to benefit the fishery resource pursuant to Mont. Code Ann. §85-2-408, or water use
29 pursuant to Mont. Code Ann. §85-2-439 when authorization does not require
30 appropriation works, the proposed means of diversion, construction and operation of the
31 appropriation works are adequate; the proposed use of water is a beneficial use; except
32 for a lease authorization pursuant to Mont. Code Ann. §85-2-436 or a temporary change

1 authorization pursuant to Mont. Code Ann. §85-2-408 or Mont. Code Ann. §85-2-439 for
2 instream flow to benefit the fishery resource, the applicant has a possessory interest, or
3 the written consent of the person with the possessory interest, in the property where the
4 water is to be put to beneficial use; if the change in appropriation right involves salvaged
5 water, the proposed water-saving methods will salvage at least the amount of water
6 asserted by the applicant; and, if raised in a valid objection, the water quality of a prior
7 appropriator will not be adversely affected; and the ability of a discharge permit holder to
8 satisfy effluent limitations of a permit will not be adversely affected. Mont. Code Ann.
9 §§85-2-402(2)(a) through (g).

10 **Adverse Effect**

- 11 3. The Applicant has proven by a preponderance of the evidence that the historic
12 consumptive use of water is less than the consumptive use of water under the proposed
13 change. The amount of water consumed under a proposed change in water right cannot
14 exceed the amount of water historically consumed under that right. See *In the Matter of*
15 *Application to Change a Water Right No. 40M-30005660 by J. Harry Taylor II and*
16 *Jacqueline R. Taylor*, Final Order (2005). The Applicant has shown that the
17 consumptive use of water after the change will be less than the historic consumptive
18 use. Evaporation from the free water surface of the pond(s) will be approximately 22
19 acre-feet during the period of diversion compared to approximately 58.73 acre-feet as a
20 result of the historic irrigation practices. The balance of the 107 acre-feet historically
21 diverted (approximately 85 acre-feet) will be used to hold the ponds at their desired full
22 capacity eventually being lost through seepage back to the natural system. This 85
23 acre-feet represents more than the historic return flow resulting from seepage when the
24 area was irrigated. In *Application for Change of Appropriation Water Rights Nos.*
25 *101960-41S and 101967-41S by Royston*, 249 Mont. 425, 816 P.2d 1054 (1991) the
26 Royston's applications were denied based in part because the hearing examiner found
27 that due to the proximity to the creek of the acreage originally irrigated, most of the
28 **unconsumed** water would have quickly returned to the creek but that due to the
29 increased distance of the new places of use from the creek under the proposed change
30 that there would be significantly less immediate return flow to the creek. In the instant
31 matter, the place of use of the old irrigation is essentially the same as the place of use
32 for the pond(s) and thus the return flows under the new use will not be significantly

1 affected. In fact, if the same 107 acre feet is diverted into the ponds instead of onto the
2 irrigated field, the consumptive use will decrease and the amount returning as
3 subsurface flow will increase. (Finding of Fact 10, 11, 12)

- 4 4. Only those portions of a stipulation relating to fulfillment of statutory criteria may be
5 included in permit conditions. See *In the Matter of the Application for Beneficial Water*
6 *Use Permit No. 32257-s76L; and Applications for Change of Appropriation Water Right*
7 *Nos. 32236-C76L; 32237-C76L; and 32238-C76L by Frank Pope, Final Order, (1985).*

8 The Applicant has agreed to install three measuring flumes, a new diversion structure, to
9 limit the time of diversion under Statement of Claim 8335 to May 15 through August 15,
10 to limit the maximum rate of diversion under Statement of Claim 8335 to 1.25 cfs, and if
11 diversion exceeds 1.25 cfs that such excess water be available under his water right
12 evidenced in Statement of Claim 8336. These are conditions which are appropriate for
13 inclusion as conditions in any permit which may issue under these applications, and are
14 adequate to provide a preponderance of the evidence that the proposed changes will not
15 adversely affect the water rights of other persons or other perfected or planned uses or
16 developments for which a permit or certificate has been issued or for which a state water
17 reservation has been issued. (Finding of Fact 13)

18 **Adequacy of Appropriation Works**

- 19 5. The Applicant has shown by a preponderance of the evidence that the proposed means
20 of diversion, construction, and operation of the appropriation works are adequate. An
21 applicant must show that their proposed system can be constructed and operated to
22 divert and deliver the amount of water requested reasonably efficiently and without
23 waste, and to control the amount of water diverted such that it can be regulated in
24 accordance with the system of priority on the source. See *In the Matter of the*
25 *Application for Beneficial Water Use Permit No. 72399-s41D by United State of America,*
26 *United States Department of the Interior, Bureau of Land Management, Proposal for*
27 *Decision, (denied on other grounds) (1991).* The record clearly demonstrates that the
28 proposed means of diversion, with provisions of the Settlement Agreement incorporated
29 as conditions of any approval that the means of diversion are adequate. (Finding of Fact
30 14, 15, 16)

1 **Beneficial Use**

2 6. The Applicant has shown by a preponderance of the evidence that the use of water is a
3 beneficial use. While this criterion was not an issue in the contested case hearing
4 process, the Department nonetheless must make a determination that the Applicant has
5 shown by a preponderance of the evidence that the use of water is a beneficial use. The
6 standard, for applications such as these which were not deemed correct and complete
7 until after the adoption of the Departments' rules effective January 1, 2005, are found in
8 ARM 36.12.1801(3) "[a]n application to change must contain information explaining why
9 the requested flow rate and volume to be changed are reasonable for the intended
10 purpose." Departmental precedent has held that recreational use of water is a beneficial
11 use and has further found that the use of water for its intrinsic aesthetics is part of the
12 recreational use of water. See *In the Matter of the Application for Change of Beneficial*
13 *Water Use Permit No. G55348-76M and the Application for Change of Appropriation*
14 *Water Right No. G99591-76M by Brookside Estates, Inc.* (1989). In the instant matter it
15 is clear that in addition to using the ponds for fishery purposes, the applicant desires to
16 use the ponds for recreational purposes including aesthetic purposes. While
17 quantification of a water use for recreation and aesthetic purposes is highly subjective, I
18 find that using the water from the area previously irrigated, which is now a gravel pit, for
19 recreational and aesthetic purposes is a reasonable use of the water especially in light
20 of the fact that the record shows that there should be an overall water savings over the
21 previously irrigated land. The applicant has provided information which explains that
22 water for the pond(s) is needed to offset evaporative losses and to maintain the ponds at
23 a desired level for recreation and aesthetic purposes. In addition, the record shows that
24 maintaining the ponds at the desired surface water elevation will optimize their ability to
25 support a fishery. The proposed use is a use which will benefit the Applicant. (Finding
26 of Fact 17, 18, 19, Conclusion of Law 3)

27 **Possessory Interest**

28 7. The Applicant has proven by a preponderance of the evidence that he has a possessory
29 interest in the property where the water is to be put to beneficial use. (Finding of Fact
30 20, 21)

1 **Water Quality**

2 8. The Applicant has proven by a preponderance of the evidence that the water quality of
3 an appropriator will not be adversely affected. The objectors' primary concern is that by
4 filling the ponds to the desired level will cause localized water table mounding which
5 could in turn interfere with the function of septic systems. The preponderance of the
6 evidence in the record indicates that any potential mounding will be at most minimal and
7 that there will be no adverse affect on area septic systems. (Findings of Fact 22, 23, 24)

8 **WHEREFORE**, based upon the foregoing Findings of Fact and Conclusions of Law, the
9 Hearing Examiner makes the following:

10 **PROPOSED ORDER**

11 Subject to the terms, conditions, restrictions, and limitations specified below,
12 Authorization to Change Water Right Application Nos. 41H-30013196 and 41H-30013197 are
13 hereby **APPROVED**.

14 The purpose of use for Statement of Claim Nos. 41H-8335 and 41H-8336 is changed
15 from irrigation to recreation and fishery. The location of use for Statement of Claim Nos. 41H-
16 8335 and 41H-8336 is changed **from** 11 acres in SWSW, Sec. 13, T02S, R04E; 29 acres in
17 NWNW, Sec. 24, T02S, R04E; 5 acres in SWNW, Sec. 24, T02S, R04E, **to** 19 acres in
18 S2SWSW, Sec. 13, T02S, R04E and W2NW, Sec. 24, T02S, R04E. As a remark, the point of
19 diversion for both Statement of Claim Nos. 41H-8335 and 41H-8336 should read SWNWNW,
20 Sec. 24, T02S, R04E from the Allison Lewis Ditch. The period of diversion for Statement of
21 Claim No. 41H-8335 is changed to May 15 through August 15. The period of diversion for
22 Statement of Claim No. 41H-8336 remains unchanged.

23 The Applicant shall install, at his sole cost and expense, the following measuring devices
24 at the designated locations:

- 25 1. A parshall flume (Flume 1) measuring device located in Elk Grove Slough
26 immediately above the confluence of Elk Grove Slough and the Allison Lewis
27 Ditch, as denoted on the aerial photograph attached as Exhibit 1 of the
28 "Settlement Agreement and Conditional Withdrawal of Objection" entered as
29 Exhibit A4B of the hearing record.

- 1 2. A parshall flume (Flume 2) measuring device in Elk Grove Slough
2 immediately below Applicant's proposed point of diversion, as denoted on the
3 aerial photograph attached as Exhibit 1 of the "Settlement Agreement and
4 Conditional Withdrawal of Objection" entered as Exhibit A4B of the hearing
5 record.
- 6 3. A parshall flume measuring device located in the Allison Lewis Ditch
7 immediately above the confluence of Elk Grove Slough with the Allison Lewis
8 Ditch, as denoted on the aerial photograph attached as Exhibit 1 of the
9 "Settlement Agreement and Conditional Withdrawal of Objection" entered as
10 Exhibit A4B of the hearing record.

11 The Applicant shall hire a qualified professional engineer to insure the parshall flumes are
12 properly installed and calibrated so as to insure accurate measurements of water at each
13 location. The installation of these measuring devices shall be completed prior to utilization of
14 water under these Change of Water Right Applications.

15 The Applicant shall remove his existing diversion culvert with slide gate and shall install,
16 at his sole cost and expense, an appropriate, non-leaking and lockable diversion structure no
17 greater than ten inches in diameter with a screw gate to open and close it at his proposed point
18 of diversion. The approximate location of this diversion structure is denoted as the "Simpson
19 Pond Point of Diversion" on the aerial photograph attached as Exhibit 1 of the "Settlement
20 Agreement and Conditional Withdrawal of Objection" entered as Exhibit A4B of the hearing
21 record.

22 At all times Applicant is diverting water from Elk Grove Slough under Statement of Claim
23 No. 41H-8335, Applicant shall insure that the flow measured in Elk Grove Slough at Flume 1, up
24 to 5.0 cfs, must remain in Elk Grove Slough and be measured at Flume 2 to satisfy water rights
25 evidenced by Statement of Claim 41H-115523. If less than 5.0 cfs is measured at Flume 1, the
26 Applicant may not divert any Elk Grove Slough water and must insure that the flow measured at
27 Flume 1 must also be measured at Flume 2.

28 At no time shall the Applicant divert more than the claimed flow rate under Statement of
29 Claim No. 41H-8335 of 1.25 cfs from Elk Grove Slough. If more than 1.25 cfs is diverted at the

1 Applicant's diversion structure, any water above that amount must be available under his water
2 right evidenced in Statement Claim No. 41H-8336 and diverted into the Allison Lewis Ditch as
3 measured at the Allison Lewis Lateral Flume.

4 Applicant shall pay all costs associated with the future maintenance and/or replacement
5 of the diversion structure or measuring devices required under these change authorizations.

6 These change authorizations are subject to a private agreement between the parties to
7 the "Settlement Agreement and Conditional Withdrawal of Objection" evidenced as Exhibit A4B
8 of the hearing record in this matter. Portions of the "Settlement Agreement and Conditional
9 Withdrawal of Objection" not incorporated into these change authorizations may be enforceable
10 through private third party actions.

11 **NOTICE**

12 This Proposal for Decision may be adopted as the Department's final decision unless
13 timely exceptions are filed as described below. Any party adversely affected by this Proposal for
14 Decision may file exceptions and a supporting brief with the Hearing Examiner and request oral
15 argument. Exceptions and briefs, and requests for oral argument must be filed with the
16 Department by **August 30, 2007**, or postmarked by the same date, and copies mailed by that
17 same date to all parties. No new evidence will be considered.

18 No final decision shall be made until after the expiration of the above time periods, and
19 due consideration of *timely* oral argument requests, exceptions, and briefs.

20
21 Dated this 31st day of July 2007.

22 /Original signed by David A Vogler/

23 David A. Vogler
24 Hearing Examiner
25 Department of Natural Resources
26 And Conservation
27 PO Box 201601
28 Helena, MT 59620-1601

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the PROPOSAL FOR DECISION was served upon all parties listed below on this-day 31st day of July 2007 by first class United States mail.

HARLEY R HARRIS - ATTORNEY
PO BOX 1144
HELENA MT 59624

DENNIS SIMPSON
7720 SHEDHORN DR PMB 138
BOZEMAN MT 59718

WATER RIGHT SOLUTIONS INC -
CONSULTANT
303 CLARKE ST
HELENA MT 59601 6286

FRANK SILVA
PO BOX 672
GALLATIN GATEWAY MT 59730

ROSELEE & RUSSELL FAUST
176 LOWER RAINBOW RD
BOZEMAN MT 59718 9425

DAVID A POTTS
80730 GALLATIN RD
BOZEMAN MT 59718

DENNIS A MARLOW
80800 GALLATIN RD
BOZEMAN MT 59718

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304 N 18TH AVE
BOZEMAN MT 59715

MIDDLE CREEK MEADOWS WATER USERS
ASSOCIATION INC
29 SUNDANCE TR
BOZEMAN MT 59718

Cc:
BOZEMAN REGIONAL OFFICE
2273 BOOT HILL CT, STE 110
BOZEMAN MT 59715

CINDY E YOUNKIN – ATTORNEY
PO BOX 1288
BOZEMAN MT 59771

FRANK A ALBINI
114 ARROWHEAD TRAIL
BOZEMAN MT 59718-9441

DEBRA L WAHLBERG
11 CHINOOK TRAIL
BOZEMAN MT 59715

HECOX FAMILY TRUST
93 ICE BLUE RD
BOZEMAN MT 59715

ANTHONY C KOLNIK
658 N WARREN ST
HELENA MT 59601

/Original signed by Jamie Price/
Jamie Price
Hearings Unit, 406-444-6615

1 **BEFORE THE DEPARTMENT OF**
2 **NATURAL RESOURCES AND CONSERVATION**
3 **OF THE STATE OF MONTANA**

4 * * * * *

IN THE MATTER OF APPLICATIONS NO.)
41H-30013196 AND NO. 41H-30013197)
TO CHANGE WATER RIGHT NOS. 41H-) **FINAL ORDER**
W008336 AND 41H-W008335 BY)
DENNIS D SIMPSON)

5 * * * * *

6 The time period for filing exceptions, objections, or comments to the Proposal For
7 Decision in this matter has expired. No timely written exceptions were received. Therefore,
8 having given the matter full consideration, the Department of Natural Resources and
9 Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as
10 contained in the July 31, 2007, Proposal for Decision and incorporates them herein by reference
11 with the following scriveners correction:

12 On page 9, line12, of the Proposal for Decision, the word "less" is changed to "more".

13 WHEREFORE, based upon the record herein, the Department makes the following:

14 **ORDER**

15 Subject to the terms, conditions, restrictions, and limitations specified below,
16 Authorization to Change Water Right Application Nos. 41H-30013196 and 41H-30013197 are
17 hereby **APPROVED**.

18 The purpose of use for Statement of Claim Nos. 41H-8335 and 41H-8336 is changed
19 from irrigation to recreation and fishery. The location of use for Statement of Claim Nos. 41H-
20 8335 and 41H-8336 is changed **from** 11 acres in SWSW, Sec. 13, T02S, R04E; 29 acres in
21 NWNW, Sec. 24, T02S, R04E; 5 acres in SWNW, Sec. 24, T02S, R04E, **to** 19 acres in
22 S2SWSW, Sec. 13, T02S, R04E and W2NW, Sec. 24, T02S, R04E. As a remark, the point of
23 diversion for both Statement of Claim Nos. 41H-8335 and 41H-8336 should read SWNWNW,
24 Sec. 24, T02S, R04E from the Allison Lewis Ditch. The period of diversion for Statement of

1 Claim No. 41H-8335 is changed to May 15 through August 15. The period of diversion for
2 Statement of Claim No. 41H-8336 remains unchanged.

3 The Applicant shall install, at his sole cost and expense, the following measuring devices
4 at the designated locations:

- 5 1. A Parshall flume (Flume 1) measuring device located in Elk Grove Slough
6 immediately above the confluence of Elk Grove Slough and the Allison Lewis
7 Ditch, as denoted on the aerial photograph attached as Exhibit 1 of the
8 "Settlement Agreement and Conditional Withdrawal of Objection" entered as
9 Exhibit A4B of the hearing record.
- 10 2. A Parshall flume (Flume 2) measuring device in Elk Grove Slough
11 immediately below Applicant's proposed point of diversion, as denoted on the
12 aerial photograph attached as Exhibit 1 of the "Settlement Agreement and
13 Conditional Withdrawal of Objection" entered as Exhibit A4B of the hearing
14 record.
- 15 3. A Parshall flume measuring device located in the Allison Lewis Ditch
16 immediately above the confluence of Elk Grove Slough with the Allison Lewis
17 Ditch, as denoted on the aerial photograph attached as Exhibit 1 of the
18 "Settlement Agreement and Conditional Withdrawal of Objection" entered as
19 Exhibit A4B of the hearing record.

20 The Applicant shall hire a qualified professional engineer to ensure the Parshall flumes are
21 properly installed and calibrated so measurements of water at each location are accurate. The
22 installation of these measuring devices shall be completed prior to utilization of water under
23 these Change of Water Right Applications.

24 The Applicant shall remove his existing diversion culvert with slide gate and shall install,
25 at his sole cost and expense, an appropriate, non-leaking and lockable diversion structure no
26 greater than ten inches in diameter with a screw gate to open and close it at his proposed point
27 of diversion. The approximate location of this diversion structure is denoted as the "Simpson
28 Pond Point of Diversion" on the aerial photograph attached as Exhibit 1 of the "Settlement

1 Agreement and Conditional Withdrawal of Objection” entered as Exhibit A4B of the hearing
2 record.

3 At all times Applicant is diverting water from Elk Grove Slough under Statement of Claim
4 No. 41H-8335, Applicant shall insure that the flow measured in Elk Grove Slough at Flume 1, up
5 to 5.0 cfs, must remain in Elk Grove Slough and be measured at Flume 2 to satisfy water rights
6 evidenced by Statement of Claim 41H-115523. If less than 5.0 cfs is measured at Flume 1, the
7 Applicant may not divert any Elk Grove Slough water and must ensure that the flow measured
8 at Flume 1 must also be measured at Flume 2.

9 At no time shall the Applicant divert more than the claimed flow rate under Statement of
10 Claim No. 41H-8335 of 1.25 cfs from Elk Grove Slough. If more than 1.25 cfs is diverted at the
11 Applicant’s diversion structure, any water above that amount must be available under his water
12 right evidenced in Statement Claim No. 41H-8336 and diverted into the Allison Lewis Ditch as
13 measured at the Allison Lewis Lateral Flume.

14 Applicant shall pay all costs associated with the future maintenance and/or replacement
15 of the diversion structure or measuring devices required under these change authorizations.

16 These change authorizations are subject to a private agreement between the parties to
17 the “Settlement Agreement and Conditional Withdrawal of Objection” evidenced as Exhibit A4B
18 of the hearing record in this matter. Portions of the “Settlement Agreement and Conditional
19 Withdrawal of Objection” not incorporated into these change authorizations may be enforceable
20 through private third party actions.

21 **NOTICE**

22 This final order may be appealed by a party in accordance with the Montana
23 Administrative Procedure Act (Title 2, Chapter 4, Mont. Code Ann.) by filing a petition in the
24 appropriate court within 30 days after service of the order.

25 If a petition for judicial review is filed and a party to the proceeding elects to have a
26 written transcript prepared as part of the record of the administrative hearing for certification to
27 the reviewing district court, the requesting party must make arrangements for preparation of the
28 written transcript. If no request is made, the Department will transmit only a copy of the audio
29 recording of the oral proceedings to the district court.

1 Dated this 14th day of September, 2007.

2 /Original signed by John E Tubbs/

3 John E. Tubbs, Administrator
4 Department of Natural Resources
5 And Conservation
6 PO Box 201601
7 Helena, MT 59620-1601

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the FINAL ORDER was served upon all parties listed below on this 17th day of September 2007 by first class United States mail.

HARLEY R HARRIS - ATTORNEY
PO BOX 1144
HELENA MT 59624

DENNIS SIMPSON
7720 SHEDHORN DR PMB 138
BOZEMAN MT 59718

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658 N WARREN ST
HELENA MT 59601

/Original signed by Jamie Price/
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